

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMRIT CHATELAIN,)	CASE NO. C07-0489-MJP
)	
Petitioner,)	
)	
v.)	REPORT AND RECOMMENDATION
)	
A. NEIL CLARK, Field Office Director of U.S.)	
Immigration and Customs Enforcement,)	
)	
Respondent.)	
_____)	

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Amrit Chatelain, proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, challenging the lawfulness of his detention by the U.S. Immigration and Customs Enforcement (“ICE”). (Dkt. #6). Petitioner argues that his continued detention without bond violates his due process rights and that he is entitled to release under Section 236 of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1226, because he is not a flight risk or a danger to society. Respondent has moved to dismiss, arguing that petitioner is lawfully detained under INA § 241(a), 8 U.S.C. § 1231(a), which allows for continued detention at the discretion of the Attorney General after a final order of removal has been issued. (Dkt.

01 #13).

02 Having carefully reviewed the entire record, I recommend that petitioner's habeas petition
03 (Dkt. #6) be DENIED and respondent's motion to dismiss (Dkt. #13) be GRANTED.

04 II. BACKGROUND AND PROCEDURAL HISTORY

05 Petitioner is a native and citizen of India who entered the United States on July 23, 1983,
06 as a Lawful Permanent Resident as the adopted son of United States citizens.¹ (Dkt. #12 at L1-2,
07 L24). Petitioner never naturalized to become a United States citizen. On September 1, 1998,
08 petitioner was convicted in the Circuit Court of the State of Oregon for Multnomah County for
09 the offense of delivery of a controlled substance in violation of Oregon Revised Statute
10 475.992(1), and was sentenced to 24-months probation. (Dkt. #12 at L57-60). On March 23,
11 1999, petitioner was found to have violated his probation and was sentenced to 30 days in prison.
12 (Dkt. #12 at L56). On January 19, 2000, his probation was revoked and he was sentenced to five
13 months in prison. (Dkt. #12 at L55).

14 Petitioner came to the attention of ICE while he was incarcerated with the State of Oregon
15 Department of Corrections for a conviction of burglary in the second degree. (Dkt. #12 at R121).
16 On April 27, 2006, ICE served petitioner with a Warrant for Arrest of Alien, a Notice of Custody
17 Determination, and a Notice to Appear ("NTA"), placing him in removal proceedings and charging
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19 ¹ The Court notes for the record that petitioner refers to events and circumstances in his
20 habeas petition that appear to involve immigration proceedings not involving the petitioner. For
21 example, petitioner states that he is "a 21-year-old man who has been locked in a prison cell for
22 some 24 months," even though petitioner is 31 years old and has been detained for 16 months.
(Dkt. #6 at 8). In addition, petitioner refers to findings by a Magistrate Judge, even though no
such findings have been made in this case. (Dkt. #6 at 4). Petitioner's misstatements, however,
are immaterial to resolving his claims for relief.

01 him with removability under INA § 237(a)(2)(A)(iii), for having been convicted of an aggravated
02 felony as defined in INA § 101(a)(43)(B). (Dkt. #12 at L35-37, R91). The Notice of Custody
03 Determination indicated that ICE had determined that petitioner would remain detained pending
04 his immigration proceedings. (Dkt. #12 at L33). On June 26, 2006, petitioner appeared, with
05 counsel, for a master hearing before an Immigration Judge (“IJ”), who denied petitioner release
06 on bond. (Dkt. #12 at L66, L77). Petitioner filed an application for asylum, withholding of
07 removal, and protection under the Convention Against Torture (“CAT”). On September 6, 2006,
08 after a removal hearing, the IJ denied all relief and ordered petitioner removed to India based on
09 the charges contained in the NTA. (Dkt. #12 at L184, L187). Petitioner appealed the IJ’s
10 decision to the Board of Immigration Appeals (“BIA”). On December 19, 2006, the BIA affirmed
11 the IJ’s decision and dismissed the appeal, finding that petitioner’s conviction of an aggravated
12 felony rendered him removable and ineligible for asylum. (Dkt. #12 at L185-87). The BIA also
13 concluded that the IJ had properly denied petitioner’s request for withholding of removal because
14 he had not demonstrated a clear probability of persecution on account of his social group or any
15 other listed reason. *Id.* Finally, the BIA concluded that petitioner was not entitled to relief under
16 the CAT, because the record does not show that it is more likely than not he would be tortured
17 in India. *Id.* Accordingly, petitioner’s order of removal became administratively final on
18 December 19, 2006. *See* INA § 101(a)(47)(B), 8 U.S.C. § 1101(a)(47)(B).

19 On January 18, 2007, petitioner filed a petition for review of the BIA’s decision with the
20 Ninth Circuit Court of Appeals, and a motion for stay of removal. Under Ninth Circuit General
21 Order 6.4(c)(1), this caused a temporary stay of removal to automatically issue. *See Chatelain*
22 *v. Gonzales*, No. 07-70219 (9th Cir. filed Jan. 18, 2007). Petitioner’s petition for review remains

01 pending in the Ninth Circuit.

02 On January 19, 2007, ICE notified petitioner that his detention status would be reviewed
03 on or about March 19, 2007, and that he could submit any documentation he wished to be
04 reviewed in support of his release. (Dkt. #12 at R133). Petitioner did not submit any
05 documentation for review. (Dkt. #12 at R136). On April 3, 2007, petitioner filed the instant
06 Petition for Writ of Habeas Corpus, challenging his continued detention. (Dkt. #6).

07 On April 17, 2007, ICE completed a Post Order Custody Review of petitioner's case.
08 (Dkt. #12 at R134-42). The reviewing officer recommended continued detention, stating that
09 petitioner

10 appears to be a flight risk at this time, in that he would probably not appear for
11 removal if his Ninth Circuit Court of Appeals Petition for Review were dismissed.
12 This is based on [petitioner's] extensive and serious criminal record, his lack of work
13 experience, and his lack of documentation of rehabilitation and/or plans for his life.
14 It is also based on his extensive criminal history prior to his first encounter by ICE and
15 his propensity to re-offend. Accordingly, it is recommended that [petitioner] remain
16 detained until a decision is made on his case by the US Court of Appeals for the Ninth
17 Circuit.

18 (Dkt. #12 at R135). On April 26, 2007, ICE Field Office Director A. Neil Clark followed the
19 recommendation and informed petitioner that he would continue to be detained in the custody of
20 ICE pending the result of his petition for review. (Dkt. #12 at R144).

21 On May 17, 2007, respondent filed a Return Memorandum and Motion to Dismiss. (Dkt.
22 #13). Petitioner did not file a response. The habeas petition and motion to dismiss are ready for
review.

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01 III. DISCUSSION

02 A. The Removal Period Has Not Yet Begun, and Petitioner is Lawfully Detained
 03 Pursuant to INA § 236.

04 Section 236 of the INA provides the framework for the arrest, detention, and release of
 05 aliens in removal proceedings. Once removal proceedings have been completed, the detention and
 06 release of aliens shifts to INA § 241, 8 U.S.C. § 1231. The determination of when an alien
 07 becomes subject to detention under Section 241 rather than Section 236 is governed by Section
 08 241(a)(1). INA § 241(a)(1)(B) provides that:

09 The removal period begins on the latest of the following:

10 (i) The date the order of removal becomes administratively final.

11 (ii) If the removal order is judicially reviewed and if a court orders a stay of the
 12 removal of the alien, the date of the court's final order.

13 (iii) If the alien is detained or confined (except under an immigration process), the
 14 date the alien is released from detention or confinement.

15 8 U.S.C. § 1231(a)(1)(B)(emphasis added). Thus, pursuant to Section 241(a)(1)(B)(ii), where
 16 a court issues a stay of removal pending its review of an administrative removal order, the alien
 17 continues to be detained under Section 236 until the court renders its decision. *See Ma v.*
 18 *Ashcroft*, 257 F.3d 1095, 1104 n.12 (9th Cir. 2001) (stating, “[i]f the removal order is stayed
 19 pending judicial review, the ninety day period begins running after the reviewing court’s final
 20 order.”); *see also Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (ordering the release of
 21 petitioner who had been detained pending appeal for two years and eight months under INA §
 22 236(c)); *Martinez-Jaramillo v. Thompson*, 120 Fed. App’x 714, 717 (9th Cir. 2005) (holding that
 where a stay of removal is granted pending judicial review, INA § 236 provides the statutory basis

01 for detention); *Martinez v. Gonzales*, __ F. Supp. 2d __, 2007 WL 2402737, at *5 (C.D. Cal.
02 Aug. 17, 2007) (holding that because a petition for review of petitioner's final order of removal
03 is pending before the Ninth Circuit and a stay of removal remains in effect, section 1231 does not
04 govern petitioner's detention); *Kothandaraguipathy v. Dep't of Homeland Sec.*, 396 F. Supp. 2d
05 1104, 1107 (D. Ariz. 2005) (holding, "detention is pursuant to the pre-removal order detention
06 statute, 8 U.S.C. § 1226, rather than the post-removal order detention statute, 8 U.S.C. § 1231"
07 when § 1231(a)(1)(B)(ii) applies to delay commencement of the removal period); *Quezada-Bucio*
08 *v. Ridge*, 317 F. Supp. 2d 1221, 1224 (W.D. Wash. 2004) (same). Here, the Ninth Circuit has
09 issued a stay of removal pending its review of petitioner's removal order, and the petition for
10 review remains pending. "Because Petitioner's removal order has been stayed by the Ninth Circuit
11 pending its review of the BIA's decision, the 'removal period' has not yet commenced, and
12 Petitioner therefore is detained pursuant to INA § 236." *Quezada-Bucio*, 317 F. Supp. 2d at
13 1224.

14 Respondent argues that the removal period commenced on December 19, 2006, when
15 petitioner's order of removal became administratively final, and that he is therefore detained under
16 INA § 241. Respondent further argues that the removal period has been extended under INA §
17 241(a)(1)(C) because petitioner acted to prevent his removal by seeking a stay of removal. (Dkt.
18 #13 at 4-5). Contrary to respondent's argument, this Court has repeatedly held that when the
19 Ninth Circuit enters a stay of removal pending its review of an administratively final order of
20 removal, the alien continues to be detained under INA § 236 until the Ninth Circuit renders its
21 decision. See *Quezada-Bucio*, 317 F. Supp. 2d at 1224; see also *Rodriguez-Carabantes v.*
22 *Chertoff*, No. C06-1517Z, 2007 WL 1268500, at *3-5 (W.D. Wash. May 1, 2007); *Middleton v.*

01 *Clark*, No. C06-1324RSM, 2007 WL 1031725, at *1 (W.D. Wash. April 2, 2007); *Prieto-Romero*
02 *v. Clark*, No. C07-784RSL, 2007 WL 565872, at *1 (W.D. Wash. February 16, 2007); *Roque v.*
03 *Chertoff*, No. C06-0156TSZ, 2006 WL 1663620, at *3 (W.D. Wash. June 12, 2006). As noted,
04 where a “removal order is judicially reviewed and if a court orders a stay of the removal of the
05 alien,” the removal period does not begin until “the date of the court’s final order.” INA §
06 241(a)(1)(B)(ii), 8 U.S.C. § 1231(a)(1)(B)(ii). Because the removal period has not commenced
07 by virtue of INA § 241(a)(1)(B)(ii), Section 241(a)(1)(C) is inapplicable. Thus, neither provision
08 governs petitioner’s detention in this case.

09 Respondent cites several cases in support of his argument, (Dkt. #13 at 6), however,
10 “[t]hese cases are either inapposite or offer analyses that this Court has repudiated.” *Rodriguez-*
11 *Carabantes*, No. C06-1517Z, 2007 WL 1268500 at 3-4 (rejecting *Glassia v. Coleman*, No. C02-
12 1222 (W.D. Wash. February 3, 2003) (Rothstein, J.); *Akinwale v. Ashcroft*, 287 F.3d 1050 (11th
13 Cir. 2002); *Fahim v. Ashcroft*, 227 F. Supp. 2d 1359 (N.D. Ga. 2002); *De La Teja v. U.S.*, 321
14 F.3d 1357 (11th Cir. 2003); *Kayrouz v. Ashcroft*, 261 F. Supp. 2d 760 (E.D. Ky 2003)). Here,
15 the Court similarly rejects respondent’s argument. The Court concludes that the removal period
16 has not yet begun, and that petitioner is detained pursuant to INA § 236(a).

17 Under INA § 236(a) respondent has discretion to decide whether an alien should be
18 detained, released on bond, or released on conditional parole upon a finding of flight risk and
19 danger to the community. INA § 236(a), 8 U.S.C. § 1226(a). Factors considered include: (1) the
20 nature and number of disciplinary infractions received while incarcerated or detained; (2) the
21 nature and severity of the alien’s convictions, sentences imposed, parole history, recidivism, and
22 other criminal history; (3) psychiatric and psychological reports; (4) evidence of rehabilitation; (5)

01 ties to the United States; (6) prior immigration violations; (7) flight risk, including history of
02 escapes and failures to appear; (8) other information that is probative of whether the alien is likely
03 to endanger the community or violate his or her release conditions. *See* 8 C.F.R. § 241.4(f).

04 Here, the administrative record indicates that respondent considered these factors when
05 reviewing petitioner's custody status. As indicated above, the ICE reviewing officer noted that
06 petitioner had an extensive and serious criminal history, including charges of burglary, robbery,
07 assault, attempt to elude police, sale of cocaine, possession of controlled substances, and
08 numerous driving offenses. (Dkt. #12 at R135). In addition, the reviewing officer noted
09 petitioner's lack of work experience, his lack of documentation for his plans for life, his lack of
10 documentation of rehabilitation, and his propensity to re-offend. *Id.* Accordingly, the Court finds
11 that petitioner's detention was implemented in a fair manner and does not violate procedural due
12 process requirements. Petitioner alleges that ICE never provided him a custody review or
13 afforded him an opportunity to present evidence in support of his release. (Dkt. #6 at 9-10, 21).
14 The administrative record belies petitioner's assertion. On January 19, 2007, ICE hand served on
15 petitioner a Notice to Alien of File Custody Review. This Notice informed petitioner that his
16 custody status would be reviewed on March 19, 2007, and that he could submit any
17 documentation he wished to be reviewed in support of his release. (Dkt. #12 at R132-33).
18 Petitioner, however, declined to submit any documentation for review. (DKt. #12 at R136).
19 Thus, not only was petitioner provided an individualized review, he was specifically given an
20 opportunity to submit evidence in support of his release.²

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22 ² To the extent petitioner challenges the discretionary decision the Attorney General has
made regarding his flight risk and danger to society, such determination is not subject to judicial

01 Petitioner further contends that his prolonged, indefinite detention is unlawful under the
02 Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. at 678. (Dkt. #6 at 8-9). In *Zadvydas*,
03 the Supreme Court considered whether the post-removal-period statute, INA § 241(a)(6),
04 authorizes the government "to detain a removable alien *indefinitely* beyond the removal period or
05 only for a period *reasonably necessary* to secure the alien's removal." *Id.* at 682. The petitioners
06 in *Zadvydas* could not be removed because no country would accept them. Thus, removal was
07 "no longer practically attainable," and the period of detention at issue was "indefinite" and
08 "potentially permanent." *Id.* at 690-91. The Supreme Court held that INA § 241(a)(6), does not
09 permit indefinite detention, and established a presumptively reasonable six-month period of
10 detention under INA § 241(a). *Id.* at 700-01. After this six-month period, the alien is eligible for
11 conditional release upon demonstrating that there is "no significant likelihood of removal in the
12 reasonably foreseeable future." *Id.* at 701.

13 Petitioner's reliance on *Zadvydas* is misplaced because, as discussed above, the removal
14 period has not yet commenced. Moreover, petitioner has not demonstrated that his removal to
15 India is not significantly likely in the reasonably foreseeable future. The only obstacle preventing
16 petitioner's removal is his Petition for Review and related stay of removal. Once the Ninth Circuit
17 decides his appeal, ICE will remove or release petitioner. Thus, contrary to the petitioners'
18 detention in *Zadvydas*, petitioner's detention is neither "indefinite" nor "potentially

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20 review. See INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B); INA § 236(e), 8 U.S.C. § 1226(e);
21 see also *Zadvydas v. Davis*, 533 U.S. 678, 688, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001) ("The
22 aliens here, however, do not seek review of the Attorney General's exercise of discretion; rather,
they challenge the extent of the Attorney General's authority under the post-removal-period
detention statute. And the extent of that authority is not a matter of discretion.").

01 permanent.” *See Zadvydas*, 533 U.S. at 691.

02 Petitioner also argues that he is entitled to release under the Ninth Circuit’s decisions in
03 *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006); and *Tijani v. Willis*, 430 F.3d 1241 (9th
04 Cir. 2005). Petitioner’s reliance on *Nadarajah* and *Tijani* is also misplaced. In *Nadarajah*, the
05 Ninth Circuit found that the five-year detention of an alien under the general immigration detention
06 statutes, 8 U.S.C. § 1225(b)(1)(B)(ii) and (b)(2)(A), pending the completion of his removal
07 proceedings was unreasonable. *Nadarajah*, 443 F.3d at 1080-81. In that case, the IJ had granted
08 the petitioner deferral of removal under the CAT, which was unchallenged, and asylum, which had
09 been affirmed by the BIA, and the case had been certified to the Attorney General. Applying the
10 reasoning of *Zadvydas*, the Ninth Circuit found that there was no significant likelihood of removal
11 in the reasonably foreseeable future in light of the fact that the petitioner had been awarded asylum
12 twice, as well as protection under the CAT. *Id.* In the present case, by contrast, the IJ found
13 petitioner removable and ineligible for relief from removal, and the BIA affirmed that decision.
14 Further, unlike *Nadarajah*, the length of petitioner’s detention is not due to the Attorney General’s
15 delay, but to petitioner’s petition for review and related stay of removal. Accordingly, *Nadarajah*
16 does not support petitioner’s claim for release from detention.

17 In *Tijani*, the petitioner had been subject to mandatory detention under INA § 236(c) for
18 over two years and eight months and was likely to be detained for another year or more while his
19 petition for review was pending before the Ninth Circuit. The Ninth Circuit remanded the case
20 to the district court with directions to grant the writ of habeas corpus unless the government
21 provides the petitioner with a bond hearing before an immigration judge or establishes that he is
22 a flight risk or a danger to the community. *Id.* at 1242. Here, however, petitioner is not detained

01 pursuant to INA § 236(c). Further, petitioner received an individualized bond determination
02 before an Immigration Judge and petitioner's custody status was reviewed by ICE, although
03 petitioner apparently declined to participate. Accordingly, petitioner's current detention is lawful,
04 and there is no basis for this Court to order that petitioner be released.

05 IV. CONCLUSION

06 For the foregoing reasons, I recommend that respondent's motion to dismiss be granted,
07 and that the action be dismissed. A proposed Order accompanies this Report and
08 Recommendation.

09 DATED this 11th day of September, 2007.

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12 Mary Alice Theiler
13 United States Magistrate Judge
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